The Use of Conformity Assessment of Construction Products by the European Union and National Governments: Legitimacy, Effectiveness and the Functioning of the Union Market

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published in
Certification - Trust, Accountability, Liability
2019

DOI (link to publisher)
10.1007/978-3-030-02499-4_4

The Use of Conformity Assessment of Construction Products by the European Union and National Governments: Legitimacy, Effectiveness and the Functioning of the Union Market

Richard Neerhof

1 Introduction

For over two decades, there has been a clear interest in standardisation and conformity assessment as instruments for regulation and supervision in addition to exclusive government action in the European Union and in many of its Member States. In Western European countries, these instruments have proven to be valuable for some time already. While markets are dynamic, legislation is often static and difficult to maintain. Member States have investigated whether forms of self-regulation, such as standardisation and certification, could be a viable alternative.[1] Although certification and standardisation were originally private initiatives, Member States began to use these for market regulation and even for decision-making and law enforcement by administrative authorities. In the European Union, these instruments have been actively used by the Council and Commission since the mid-1980s to eliminate barriers and to realise the free movement of goods in the internal market.

Conformity assessment and standardisation play an important role in the marketing of construction products in the EU, and these processes are often subjected to European and governmental supervision. It is therefore important to analyse whether the conformity assessment of construction products, which is used by the European Union and by certain national governments, meets criteria relating to legitimacy; whether it contributes in an effective way to the realisation of public interests such as construction safety, fire safety, the protection of the environment and sustainability;

Many thanks to Cecile Wijnen and Francis Gilligan.

[1] *Kamerstukken II* (Dutch Parliamentary Papers) 1994/95, 24,036, no 1, 2–4.

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P. Rott (ed.), *Certification – Trust, Accountability, Liability*, Studies in European Economic Law and Regulation 16,
https://doi.org/10.1007/978-3-030-02499-4_4

and whether it avoids creating obstacles with regard to the proper functioning of the internal market. In this contribution I discuss the use of conformity assessment of construction products by the Dutch government as an example of national governments using this instrument. Experiences from the Netherlands may be relevant for other countries in which systems of voluntary certification of construction products are in place. In Sect. 2 of this contribution, I first describe what conformity assessment is. Secondly, I discuss the functioning of conformity assessment in the construction industry and the way in which the Council and the European Commission of the European Union and the Dutch government use conformity assessment to pursue public interests (Sects. 3 and 4). Thirdly, some important topics concerning the use of conformity assessment in construction law by the European Union and national governments are discussed. The legitimacy and effectiveness of the use of this instrument in construction law is addressed in Sect. 5. After this, I review three important legal topics that relate to the compatibility of Dutch certification of construction products with the single market, in particular the compatibility with the Construction Products Regulation (CPR), with the free movement of goods (Articles 30 and 34 TFEU) and with European competition law (Articles 101–106 TFEU) (Sect. 6). Finally, I draw some conclusions on whether the use of conformity assessment by the European Union and the Dutch government can be seen as models of successfully leaving regulation to private parties, from the perspectives of legitimacy, effectiveness and the functioning of the single market.

2 Conformity Assessment

Conformity assessment is the process of demonstrating whether specified requirements relating to a product, process, service, system, person or body have been fulfilled. These specified requirements can be technical standards established by international (ISO), European (CEN/CENELEC and ETSI) and/or national standardisation bodies and/or certification schemes (assessment directives) established by committees of experts.[2] Technical standards are agreed upon by private parties in the industry for aligning products and production processes according to current demand.[3] In certification schemes, requirements applying to a product or process are elaborated in objectively measurable criteria. They also impose requirements on the internal quality control of the holder of a declaration of conformity (certificate), in order to ensure that the products/process continuously meet the stated requirements. In addition, requirements are imposed on conformity assessment bodies. A certification scheme determines any follow-up action if criteria are not met.[4] Certification schemes may refer to technical standards, as is often the case.

[2] Certification is a type of conformity assessment: the declaration of conformity is valid for a certain period of time.

[3] van Ommeren (2008), p. 82.

[4] Evers (2002), p. 102.

Conformity assessment is private regulation and customarily used to provide guarantees in business-to-business-relations, but is also used in regulatory and administrative practice. The European Union relies on third party conformity assessment bodies to establish the internal market ('New Approach' since 1985). Conformity assessment is used by national governments as an instrument for enforcing legislation.

In order to demonstrate that they comply with certain standards, third party conformity assessment bodies often call upon accreditation bodies. Accreditation is an attestation by a national accreditation body that a conformity assessment body meets the requirements set by harmonised standards and any additional requirements (including those set out in relevant sectoral schemes) to carry out a specific conformity assessment activity. These requirements relate to independence, impartiality and technical competence. When requested by a conformity assessment body, the national accreditation body evaluates whether that body is competent to carry out a specific conformity assessment activity (Article 5(1) of Regulation (EC) No 2018/765 setting out the requirements for accreditation and market surveillance).[5] Article 4(1) of this Regulation states that each Member State must appoint a single national accreditation body. This regulation applies to accreditation, used on a compulsory or voluntary basis, relating to conformity assessment, whether compulsory or not.

Accreditation may be legally obliged to carry out certain third-party tasks. In the European Union, the designation and notification of conformity assessment bodies, which carry out conformity assessment in respect of a particular product that is required by Community harmonisation legislation, is a task of notifying authorities designated by Member States (Article R14, section 1 of Decision No 768/2008/EC on a common framework for the marketing of products[6]). According to Article R14, section 1 of this decision, Member States may decide that this assessment and monitoring is to be carried out by a national accreditation body in accordance with Regulation (EC) No. 765/2008. Under Dutch law, assessment bodies attesting that construction law conditions are met and issuing quality certificates for construction products and processes requirements must be accredited themselves.

3 Conformity Assessment Under Union Harmonisation Legislation

3.1 From New Approach to New Legislative Framework

Before the 1980s, the removal of barriers to trade resulting from (national) technical standards belonged to the political agenda of harmonisation via European directives. The promulgation of directives was often seriously delayed because of

[5] Reg (EC) No 765/2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products [2008] OJ L 218/30.

[6] Dec No 768/2008/EC on a common framework for the marketing of products [2008] OJ L 218/82.

disagreement between Member States on technical issues. At the beginning of the 1980s, outsourcing standard setting to private rule-makers proved to be a way of promoting deregulation and self-regulation. Europe has been the main driver in the area of standardisation in the post-war period. In 1985, the 'New Approach' was introduced. Instead of the incorporation of detailed technical rules in directives, the EU promoted the development of 'framework directives' which lay down legally binding 'basic requirements'. Basic requirements are mechanical resistance and stability, safety in case of fire, sustainable use of natural resources, etc. These requirements are then concretised via technical standards, developed preferably by CEN/CENELEC or ETSI.[7]

The New Approach is applied in many areas of enterprise and industry including the construction industry. Manufacturers are required to draw up EC declarations of conformity for products—or declarations of performance in case of construction products—and affix CE marking to these products when they are covered by harmonised standards.

The New Approach was updated and reviewed in the 2000s, driven by want of overall coherence and consistency concerning: notification of third party conformity assessment bodies; accreditation; conformity assessment procedures (modules); CE marking and market surveillance.[8] Regulation (EC) No 765/2008 and Decision (EC) No 768/2008 brought together, in the New Legislative Framework (NLF), all necessary elements in order for a comprehensive regulatory framework to operate effectively for the safety and compliance of industrial products; including protective requirements for public interests and the proper functioning of the single market.[9]

[7] This historical description relies, to a large extent, on van Gestel and Micklitz (2013), p. 154.

[8] European Commission, Commission Notice The 'Blue Guide' on the implementation of EU products rules 2016 ('Blue Guide') [2016] OJ C 272/9.

[9] Reg (EC) No 765/2008 established the legal basis for accreditation and market surveillance and consolidated the meaning of the CE marking. Dec (EC) No 768/2008 updated, harmonised and consolidated the various technical instruments already used in existing Union harmonisation legislation (not only in New Approach directives): definitions, criteria for the designation and notification of conformity assessment bodies, rules for the notification process, the conformity assessment procedures (modules) and the rules for their use, the safeguard mechanisms, the responsibilities of the economic operators and traceability requirements. See Blue Guide (n 8) at 10. The NLF also includes Reg (EC) No 764/2008 laying down procedures relating to the application of certain national technical rules to products lawfully marketed in another Member State [2008] OJ L 218/21, the so-called Mutual Recognition Regulation. It applies to administrative decisions addressed to economic operators, on the basis of a technical rule, in respect of any *non-harmonised* product lawfully marketed in another Member State (recital 3 and Art 2(1) and (2)). A non-harmonised product is a product which is not subject to Union harmonisation legislation (recital 3).

3.2 CE Marking and Conformity Assessment Under the Construction Products Regulation

The Construction Products Directive (CPD),[10] in force until 1 July 2013, and its successor, the Construction Products Regulation (CPR),[11] in force from 1 July 2013, require products to be fitted with CE marking if there are harmonised standards for these products covering these characteristics. Harmonised standards for assessing performances related to essential characteristics have been established by European standardisation bodies on the basis of 'mandates' issued by the Commission (Article 17(1) CPR).[12]

Apparently, harmonised standards cover about 75% of all construction products marketed in Europe.[13] The CPR uses the term 'mandates' instead of 'requests' (of the Commission); because the harmonised standards are mandatory. The CPR mentions harmonised standards as merely one way of expressing the performance of construction products in relation to their essential characteristics (Article 6(1) CPR). In this respect, the CPR differs from 'classical' New Approach directives whose standards are 'non-binding' and compliance is no more than a presumption of conformity with the mandatory basic legal requirements spelt out in the New Approach type directives.[14] Another difference between harmonised standards under the CPR and harmonised standards under other New Approach directives is that they prescribe how to express performance of products in relation to essential characteristics and not in relation to basic requirements. The CPR does not entail construction product requirements but rather the way economic operators should properly assess performance of construction products. Construction products are semi-finished products processed in construction works. European standards referred to in the CPR (and the CPD) include testing, calculation and other means for assessing performance of construction products. These standards are binding, but the CPR 'does not affect the right of Member States to specify the requirements they deem necessary to ensure the protection of health, the environment and workers when using

[10] Dir 89/106/EEC on the approximation of laws, regulations and administrative provisions of the Member States relating to construction products [1989] OJ L 40/12 (Construction Products Directive, CPD).

[11] Reg (EU) No 305/2011 laying down harmonised conditions for the marketing of construction products [2011] OJ L 88/5 (Construction Products Regulation; CPR).

[12] CEN (Comité Européen de la Normalisation) and CENELEC (Comité Européen de la Normalisation Electronique) are European standardisation organisations listed in Annex I of Reg (EU) No 1025/2012 on European standardization [2012] OJ L 316/12 (Standardisation Regulation).

[13] The source of this figure cannot be traced back but in any case this percentage is not contradicted.

[14] Standards referred to in New Approach directives mostly determine how products should be manufactured to be in conformity with the essential requirements spelt out in the New Approach type directives. These standards are not legally binding. They may be implemented in the national jurisdictions of the Member States, but the references have voluntary character.

construction products.'[15] The rules of the Member States require 'that construction works be designed and executed so as not to endanger the safety of persons, domestic animals or property nor damage the environment.'[16] The CPR requires (legally binding) standards for the purposes of assessing the performance of construction products on request of the Commission, because this is the only way the removal of technical barriers in the field of construction may be achieved.[17]

Manufacturers are obliged to draw up EC declarations of performance for products and affix CE marking to construction products when they are covered by harmonised standards (Articles 4, 6 and 8 CPR). The declaration of performance must express the performance of construction products to characteristics of these products, which relate to basic requirements for construction works in accordance with the relevant harmonised standards (Article 6(1) CPR).

Harmonisation legislation of the EU frequently obliges conformity assessment of products to be carried out by an independent third party with an accreditation certificate (or equivalent documentary evidence) and designated by a (national) notifying authority. Based on EU-legislation, the Commission establishes which system or systems of conformity assessment are applicable to certain products. According to Article 28 CPR, assessment and verification of constancy of performance (AVCP) of construction products in relation to their essential characteristics must be carried out in accordance with one of the systems set out in Annex V CPR.[18] The Commission decides in a delegated act which system or systems are applicable to a given construction product or family of construction products or a given essential characteristic. In doing so, the Commission is obliged to take into account in particular the effect on the health and safety of people and the environment and the documented experiences forwarded by national authorities with regard to market surveillance (Article 28(2) and Article 60 CPR). The systems differ in the degree of involvement of third parties in assessing conformity of the product according to the relevant technical specification(s).

The tasks which the manufacturer or a third party have to fulfil are

- Factory production control (fpc) on the basis of documented, permanent and internal control of production in a factory, in accordance with the relevant harmonised technical specifications.
- Initial inspection of the manufacturing plant and of fpc.
- Continuous surveillance, assessment and evaluation of fpc.

[15] Recital (3) of the CPR.

[16] Recital (1) of the CPR.

[17] Recital (10) of the CPR.

[18] Annex V to Reg (EU) No 305/2011 was amended by Commission Delegated Reg (EU) No 568/2014 amending Annex V to Regulation (EU) No 305/2011 of the European Parliament and of the Council as regards the assessment and verification of constancy of performance of construction products [2014] OJ L157/78, in order to respond to technological progress, to make provision for the specific case of products for which European Technical Assessments have been issued, as well as to enhance the clarity, accuracy and consistency to the descriptions and terms used therein, see its recital (2).

- An assessment of the performance of the construction product on the basis of testing (including sampling), calculation, tabulated values or descriptive documentation of that product
- Testing of samples taken at the manufacturing plant or at the manufacturer's storage facilities.

In the five systems of AVCP, notified bodies differ as follows in their level of involvement:

- System 1+: product certification comprising the issuing of a certificate of constancy of performance with: an assessment of the performance of the construction product as referred to above (i), initial inspection of the manufacturing plant and of fpc (ii), continuous surveillance, assessment and evaluation of the fpc (iii) and testing of samples as referred to above (iv)
- System 1: product certification comprising the issuing of a certificate of constancy of performance with: an assessment of the performance of the construction product as referred to above (i), initial inspection, of the manufacturing plant and of fpc (ii), and continuous surveillance, assessment and evaluation of the fpc (iii)
- System 2+: factory production control certification with initial inspection of the manufacturing plant and of fpc (i) and continuing surveillance, assessment and evaluation of fpc (ii)
- System 3: assessment of the performance of the construction product as referred to above
- System 4: manufacturer's tasks only

In the five systems, tasks of manufacturers differ as follows:

- System 1+ and system 1: factory production control (i) and further testing of samples in accordance with the prescribed test plan (ii)
- System 2+: assessment of the performance of the construction product as referred to above (i), factory production control (ii) and testing of samples as referred to above (iii)
- System 3: factory production control
- System 4: assessment of the performance of the construction product as referred to above (i) and factory production control (ii)[19]

A harmonised standard includes technical details necessary for the implementation of the system of AVCP (Article 17(4) CPR).

According to information from the Commission, 407 of the 453 harmonised standards for construction products demand that one or more notified bodies play a role in the assessment of specific characteristics of the products and/or the production control system of the manufacturer (i.e. demand an AVCP system other than 4).[20]

[19] Compare Guidance Note on the Construction Products Regulation, https://www.bsigroup.com/LocalFiles/en-GB/industries-and-sectors/construction/BSI-Construction-Products-Regulation-guidance-UK-EN.pdf.

[20] See http://ec.europa.eu/growth/tools-databases/nando/index.cfm?fuseaction=cp.hs&cpr=Y#hs. For each standard, the applicable system of Assessment Verification of Constancy Performance can be found under 'more info'.

For the purpose of notification, a third party conformity assessment body—a 'notified body'—should meet, among others, the following requirements (Article 43 CPR):

- being established under national law and having legal personality,
- independence,
- impartiality,
- confidentiality,
- objectivity,
- professional integrity,
- accountability (have a liability insurance unless liability is assumed by the Member State) and
- technical competence.

Notifying authorities, designated by Member States (Article 40 CPR), may notify only bodies which have satisfied these requirements (Article 48 CPR). Evidence of compliance with these requirements can be provided by an accreditation certificate or in another equivalent way (Article 47 CPR).[21] Article 50 CPR sets out a procedure to challenge the competence of notified bodies. Where the Commission ascertains that a notified body does not meet, or no longer meets, the requirements for its notification, it must inform the notifying Member State accordingly and request it to take the necessary corrective measures, including withdrawal of notification, if necessary.

Article 52 CPR concerns operational obligations for notified bodies:

– *Proportionality.* The assessments should be carried out in a proportionate manner. Economic operators should not bear an unnecessary burden. In the performance of their activities, the notified bodies must take due account of the size of the undertaking, the sector in which the undertaking operates, its structure, the degree of complexity of the product technology in question and the mass or serial nature of the production process. Nevertheless, they shall respect the degree of rigour required for the product by this Regulation and the part played by the product for the fulfilment of all basic requirements for construction works (Article 52(2) CPR).
– *Resolute action.* Where, in the course of the initial inspection of the manufacturing plant and of factory production control, a notified body finds that the manufacturer has not ensured the constancy of performance of the manufactured product, it shall require the manufacturer to take appropriate corrective measures and shall not issue a certificate (Article 52(3) CPR). Where, in the course of the monitoring activity aiming at the verification of the constancy of performance of the manufactured product, a notified body finds that a construction product no longer has the same performance to that of the product-type, it must require the manufacturer to take appropriate corrective measures and should suspend or

[21] Compare the notifying requirements in Art 43 CPR and the requirements for accreditation in Art 5(1) of Reg (EC) No 765/2008.

withdraw its certificate if necessary (Article 52(4) CPR). Where corrective measures are not taken or do not have the required effect, the notified body must restrict, suspend, or withdraw any certificate, as appropriate (Article 52(5) CPR).

Article 53 CPR concerns obligations for notified bodies to inform the notifying authority and other bodies notified under this CPR carrying out similar third party tasks.

An important element is information from an economic operator about the performance of essential characteristics of the construction product (in the declaration of performance), relevant for the declared intended use or uses. This should enable market authorities in member states to decide if certain requirements for construction works are met where a product is processed in a construction work. Whether this is always the case, will be discussed infra (Sect. 5).

In case a notified body must fulfil tasks because the Commission has so decided in a delegated act as meant in Article 28(2) CPR, the question can be asked what the legal consequences are of a decision of a notified body to issue a certificate for a certain product as meant in Article 28 and annex V CPR. If the Commission decides the manufacturer is required to submit the product to a third party (usually a notified body) to carry out conformity assessment according to one of the systems 1, 1+, 2+ or 3 as determined in annex V; it is then prohibited to place that product on the market or make it available on the market without a certificate issued by the notified body. In this regard, it would appear these certificates have legal consequences. However, under the CPR the manufacturer has ultimate responsibility for the conformity of that product with its declared performance.[22] In this way, third party involvement has no influence whatsoever on the manufacturer's responsibility but is intended to reassure users and authorities that everything is in order.[23] From a legal perspective, it does not provide any additional proof of conformity of performance of a product with its declared performances.

4 Voluntary Certification of Construction Products and Processes Under National Legislation: The Dutch Building Decree as an Example

In the Netherlands, national building legislation gives legal effect under certain conditions to voluntary certification of construction products and building processes. Article 1.8 Dutch Building Decree deals with situations in which a construction product has to comply with a certain level of performance not covered by a harmonised standard (as intended in the CPR) or a construction process has to comply with certain performances so the building to which it is applied complies with a

[22] Recital (31) of the CPR. Not conformity with requirements, as is the case with declarations of conformity under other harmonised legislation of the Union, see Blue Guide (n 8), at 29.

[23] Evers (2002), p. 154.

requirement imposed by or under the Building Decree.[24] The Decree provides that such a requirement is met if the construction product or construction process has been applied in accordance with a quality certificate tailored to that requirement. According to Article 1.11 Building Decree, quality certificates must be issued on the basis of a system of quality certificates recognised by the Minister (for Internal Affairs). Article 1.8 Building Decree states that the issuing conditions as defined in Article 1.11 of the Building Decree, surrounding quality certificates, must be laid down in an agreement between the parties involved in the system meant in that provision. The Minister must announce this agreement in the Government Gazette. This agreement has indeed been made and is the so-called tripartite agreement (*tripartiete overeenkomst*) between the Dutch Accreditation Council, the Foundation Construction Quality (*Stichting Bouwkwaliteit*; hereinafter SBK) and the minister concerned.[25] According to this agreement, certification should be done by accredited bodies. Article 1.9 Building Decree states that the Minister must appoint a body that will coordinate the system meant in Article 1.11 of the Building Decree and ensure the announcement of the quality certificates meant in that article. In the tripartite agreement, SBK is appointed as the body that coordinates the system of quality certificates recognised by the minister. Schemes that are used by conformity assessment bodies have to be approved by SBK (procedural and substantive test). Only quality certificates based on schemes approved by the SBK can be used as evidence that certain requirements in the Building Decree are met (as intended in Article 1.8 Building Decree).

5 Use of Conformity Assessment of Construction Products by the European Union and National Governments: Legitimacy and Effectiveness

Above, I have described how the European Union and Dutch government use third party conformity assessment of construction products to pursue public interests. Awarding a role to third party conformity assessment and underlying standardisation in the realisation of public interests, such as safety and health, in the field of construction products is significant. It means that the European Union and the Dutch government bear the burden of legitimacy.[26] By 'legitimacy' I mean that decisions that affect citizens are only justifiable when taken by authorities having a mandate from their citizens; demonstrating that they take citizens' concerns into account in their decisions. Democratic legitimacy means that decisions affecting citizens are made by politically elected or at least publicly accountable officials. Nevertheless,

[24] I abundantly notice that many provisions in the Building Decree, which lay down requirements for construction work, refer to standards.

[25] *Staatscourant* 2006, 132. Reviewed in March 24, 2015, *Staatscourant* 2015 no. 8987.

[26] Van Gestel and Micklitz (2013), p. 157.

that is only a formal, external criterion. On a broader view of legitimacy used here, the deliberative quality of decision-making processes and representation of interests seem to be very important.[27] In Sects. 5.1 and 5.2, I discuss the question of the legitimation of the use of third party conformity assessment and underlying standardisation by the European Union and the Dutch government.

Another question concerns the effectiveness of the instrument of third party conformity assessment. Under the CPR and Dutch construction law, conformity assessment bodies function in an open market. In principle, any conformity assessment body can qualify for recognition or designation.[28] An open market provides incentives for the institution to work efficiently, which could lead to lower prices. In an open market, however, there are also risks. In Sect. 5.1 and 5.3, I discuss such risks.

5.1 Legitimacy and Effectiveness: General Aspects

The use of conformity assessment by legislators and governments has many advantages. Much of the expertise needed to regulate the risk society is located exactly where the risks are 'manufactured'.[29] Besides, conformity assessment based on harmonised standards as intended by EU harmonisation legislation contributes to the removal of barriers to trade in the European Union.

Nevertheless, there are also threats and challenges. Conformity assessment as meant in the CPR or the Building Decree is based on standards and/or schemes. This results in a burden of legitimacy in the field of conformity assessment of construction products.

Conformity assessment (and underlying standardisation) has at least one vulnerability in terms of legitimation and effectiveness: there are risks of excessive concentration of power in certain market actors. The solution to these risks is, according to *Scott*, to organise certain 'modes of control and accountability'.[30] In electoral politics, politicians are dependent on re-election by the people. *Scott* wonders whether there is an equivalent pull in the competitive processes of markets. This question is relevant in the context of conformity assessment by notified bodies under EU harmonisation legislation. This is a commercial activity. In the context of conformity assessment (by private bodies)—definitely when used by public authorities—an important 'constitutional' issue may be whether reputation 'exerts an upwards pull counterbalancing the competitive pressures to reduce costs and

[27] Compare Neerhof (2013a), pp. 144–149, including references.

[28] The fact that conformity assessment bodies are required to be notified by a public authority under EU law is of no consequence. The requirement under Dutch construction law that certification schemes are to be approved by a foundation acting on behalf of the minister is of no consequence either.

[29] Schepel (2005), p. 24.

[30] Scott (2010), pp. 7 f.

quality.'[31] What mechanisms exist to hold conformity assessment bodies accountable for mistakes? How transparent are such mistakes and how does the knowledge of such mistakes feed back into the system to improve it?[32]

As far as the legitimacy of standards underlying conformity assessment and certification schemes is concerned, a deliberative quality of decision-making processes and representation of interests is important. Deliberation asks for autonomous participants. All stakeholders—those who are affected by the decisions—should be represented in the decision-making process.[33]

5.2 Legitimacy of Conformity Assessment of Construction Products

5.2.1 Conformity Assessment Under the CPR

As discussed in this section, legitimacy of conformity assessment of construction products under the CPR is affected by the legitimacy of underlying harmonised standards and of the procedure of notification of third party conformity assessment bodies.

Legitimacy of Underlying Harmonised Standards

For the legitimacy of conformity assessment, the legitimacy of harmonised standards which the notified bodies apply are relevant. Harmonised standards under Union harmonisation legislation provide a technical basis to assess the performance of construction products, including conformity assessment by notified bodies (supra, Sect. 3.2). For the legitimacy of this conformity assessment, it is important that all relevant stakeholders are adequately represented in the standardisation process. How does one prevent underlying standardisation from exclusion? Previously conducted research indicates that larger companies are better represented in the various technical bodies of European standardisation than small/medium enterprises (SME's). For the latter, the costs of participation are too high. Moreover, technical standards reach beyond the field of detail and enter areas of public policy, such as health, safety, and environmental protection. That is why not only SMEs but also societal stakeholders who represent these wider groups (e.g. consumers, trade unions and environmental organisations) must be involved in the standardisation process. The legitimacy of the decision-making process in standardisation bodies

[31] Ibid., p. 11.

[32] Ibid., pp. 11 f.; and Schepel (2005), p. 409.

[33] Schiek (2007), pp. 446–449.

deals with the participation of consumers and environmental or labour organisations.[34] In this respect, improvements are possible and necessary.[35]

The legal framework of standardisation in the European Union has been recently revised through the EU Standardisation Regulation.[36] This regulation provides some new requirements with regard to the involvement of stakeholders. Article 5(1) of this Regulation calls upon *European* standardisation organisations to 'encourage and facilitate an appropriate representation and effective participation of all relevant stakeholders, including SMEs, consumer organisations and environmental and social stakeholders in their standardisation activities', especially by encouraging and facilitating such representation and participation through the European stakeholder organisations receiving Union financing in accordance with the Regulation at the policy development level and at the following stages of the development of European standards or European standardisation deliverables.

Moreover Article 17(2) CPR requires the European standardisation bodies to ensure that the various categories of stakeholders are in all instances represented in a fair and equitable manner where stakeholders are involved in the process of developing harmonised standards on the basis of requests from the Commission. Pressure to obey obligations like these may be exercised in the decision-making about requests to draft a European standard; about awards of grants for drafting a European standard; and about financing of standardisation organisations in general (Article 10, 15 and 17 Standardisation Regulation). Still, the Regulation seems to provide 'rather soft requirements with respect to stakeholder involvement.'[37]

In terms of the legitimacy of assessment and verification of constancy of performance (AVCP) of construction products under the CPR, it is also relevant that the Court has jurisdiction to give a preliminary ruling concerning the interpretation of underlying harmonised standards. In the case of *James Elliott*, the Court of Justice decided that Article 267(1) TFEU must be interpreted as meaning the Court has jurisdiction to give a preliminary ruling concerning the interpretation of a harmonised standard within the meaning of Article 4(1) CPD.[38] A harmonised standard adopted on the basis of the CPD (the predecessor of the CPR), and the references to which have been published in the Official Journal of the European Union, forms part of EU law, since it is by reference to the provisions of such a standard that it is

[34] European Commission, Communication 'A strategic vision for European standards: Moving forward to enhance and accelerate the sustainable growth of the European economy by 2020', COM(2011) 311 final; van Gestel and Micklitz (2013), p. 179; van Gestel (2012), p. 250.

[35] Stuurman (1995), pp. 90–94, 168–171 and 175; Evers (2002), pp. 19 and 211. For critique of the legitimacy of European standards see van Gestel and Micklitz (2013), p. 179. They clarified that access to the documents prepared in the European standards bodies restricted to public interest groups 'does not comply with constitutional standards where the law making process should be public.'

[36] See n 12.

[37] van Gestel and Micklitz (2013), p. 179.

[38] ECJ, judgment of 27/10/2016, Case C-613/14 *James Elliott Construction Limited v Irish Asphalt Limited*, ECLI:EU:C:2016:821, para 47; on which see Purnhagen (2017), p. 586.

established whether or not the presumption of conformity applies to a given product.[39]

According to established case-law, the Court has jurisdiction to interpret acts which, while indeed adopted by bodies which cannot be described as 'institutions, bodies, offices or agencies of the Union', are, by their nature, measures implementing or applying an act of EU law.[40] This is, according to the Court, justified by the very objective of Article 267 TFEU, which is to ensure the uniform application, throughout the European Union, of all provisions forming part of the European Union legal system and to ensure that the interpretation thereof does not vary according to the interpretation accorded to them by the various Member States.[41]

While the development of a harmonised standard as meant in the CPD is indeed entrusted to an organisation governed by private law, it is nevertheless a necessary implementation measure. Such a measure is strictly governed by the essential requirements defined by that Directive, initiated, managed and monitored by the Commission, and its legal effects are subject to prior publication by the Commission of its references in the 'C' series of the Official Journal of the European Union.[42] Moreover, the Commission ensures, by means of actions for failure to fulfil obligations provided for in Article 258 TFEU, that harmonised standards are fully effective.[43]

It can be assumed that this judgment of the Courts implies that the Court can also judge the validity of the harmonised standards or their compatibility with higher EU law and not only its interpretation. Article 267 TFEU does not distinguish between the jurisdiction of the Court regarding the interpretation and concerning the validity

[39] Ibid., para 40. Schepel (2013), p. 530, pointed out that now Art 10(6) and 11 Standardisation Reg make it clear that the Commission has to take a decision to publish references, based on a prior assessment whether a harmonised standard satisfies the requirements which it aims to cover and which are set out in the relevant Union harmonisation legislation.

[40] Ibid., para 34. The Court refers to its judgments of 20/9/1990, Case C-192/89, *S. Z. Sevince v Staatssecretaris van Justitie*, ECLI:EU:C:1990:322, para 10, and of 21/1/1993, Case C-188/91, *Deutsche Shell AG v Hauptzollamt Hamburg-Harburg*, ECLI:EU:C:1993:24, para 17.

[41] Ibid., para 38. The Court refers to its judgement in *Sevince* (n 40), para 11. Moreover, referring to its judgment in *Deutsche Shell* (n 40), para 18, the Court held that the fact that a measure of EU law has no binding effect does not preclude the Court from ruling on its interpretation in proceedings for a preliminary ruling under Art 267 TFEU. See ECJ – *Elliott* (n 38), para 35. Although evidence of compliance of a construction product with the essential requirements contained in the CPD may be provided by means other than proof of compliance with harmonised standards, that cannot call into question the existence of the legal effects of a harmonised standard, according to the Court, see ibid, paras 36–42. It may be doubted that it is correct that these standards are not mandatory. In any case, harmonised standards *under the CPR* have binding effect. Therefore, the Court will consider a fortiori that it has jurisdiction concerning harmonised standards as referred to in Art 17 CPR.

[42] Para 43. This is further substantiated in paras 44 f. See AG Campos Sanchez-Bordona, 28/1/2016, Case C-613/14 *James Elliott Construction Limited v Irish Asphalt Limited*, ECLI:EU:C:2016:63, paras 35–62.

[43] The Court notes that this is illustrated by its judgment of 16/10/2014, Case C-100/13 *Commission* v *Germany*, ECLI:EU:C:2014:2293.

of the actions of the EU institutions.[44] It remains to be seen what will be the concrete extent of the substantive review by the Court of these standards. *Colombo and Eliantonio* point out that 'the settled law establishing deference on substance and strict assessment of procedural irregularities acts as judicial benchmark' in this context, because the elaboration of harmonised standards 'required the evaluation of complex scientific and technical facts'. This means 'that the CJEU would not engage with the technical merits of the standard in issue. Rather it would restrict itself to parameters such as the adequacy of the information base, the assistance of experts promoting a 'deliberative' style of decision-making, and the composition and knowledge of the panel of experts.'[45] It is indeed less likely that the Court will assess the content of technical standards. However, it might be possible to carry out a test compliance of standards with Article 5 of the Standardisation Regulation concerning representation and effective participation of all relevant stakeholders.[46]

Legitimacy of the Procedure of Notification of Third Party Conformity Assessment Bodies

Finally, for legitimacy of third party conformity assessment under the CPR, an important issue is the procedure of notification of a third party conformity assessment body—a 'notified body'—(as discussed supra, in Sect. 3.2). According to an analysis of the implementation of the CPR of 2015, commissioned by the European Commission 2015, the strict requirements for notified bodies in Article 43 CPR and the notification procedure according to Articles 47 and 48 CPR have had a positive effect: in terms of increasing the credibility of the CPR, increasing legal certainty and transparency regarding the rules and ensuring that notified bodies have the necessary competence for carrying out their task and are impartial. Issues relating to conflicts of interests would be addressed.[47]

5.2.2 Conformity Assessment Under National Legislation: The Dutch Building Decree as an Example

Legitimacy of voluntary conformity assessment of construction products, for example under the Dutch Building Decree, is affected by legitimacy of underlying standards and certification schemes. It is furthermore affected by the way in which the 'watchdogs' fulfil their tasks. Under the Building Decree these watchdogs are the

[44] See for another view of the possibility to contest the validity of a harmonized standard via a reference for a preliminary ruling: Colombo and Eliantonio (2017), p. 332. Not discussed here is the possibility for judicial review within the context of Art 263 TFEU.

[45] Colombo and Eliantonio (2017), p. 333, with further references; Verbruggen and van Leeuwen (2018), pp. 405 f; Cuccuru (2018), pp. 23 f, with further references.

[46] Compare Volpato (2017), pp. 597 f.

[47] Nwaogu et al. (2015), pp. iv–v.

RvA—a Dutch accreditation body—and SBK—the aforementioned Foundation Construction Quality.

Legitimacy of Underlying Standards

In conformity assessment as meant in Article 1.8 Building Decree, conformity assessment bodies use standards, especially NEN-standards (national) and NEN-EN-standards (European). They use standards contained within the Building Decree, but they also use other standards. In this context it is relevant that Article 5 of the Standardisation Regulation concerns representation and participation in European harmonisation; and that Article 6(1) of this Regulation states that *national* standardisation bodies 'shall encourage and facilitate the access of SMEs to standards and standards development processes in order to reach a higher level of participation in the standardisation system […].' This is a fairly vague requirement. Moreover, the regulation does not provide for any enforcement tools.

Legitimacy of Certification Schemes

For the legitimacy of conformity assessment as referred to in the Building Decree, the mode of establishment of certification schemes that form the direct basis of conformity assessment of construction products (under Dutch law) is also important.[48] Earlier research in the Netherlands has shown that committees of experts are vulnerable in terms of their composition. The question is if these committees are at all well balanced. Are stakeholders represented? Furthermore, the procedures used by the committees of experts are generally unknown as opposed to the procedures used by standardisation bodies. General rules regarding composition seem to be absent. This poses a threat to a balanced equilibrium of interests.[49] This research however was not specific or not related at all to construction law.

With regard to the support of the system of quality certification, based on an evaluation of this system in 2011, it can be said that parties involved (civil servants, suppliers, construction companies and installers) know little of this system. The motivation to make use of certificates seems to be more extrinsic—'the customer wants it'—than intrinsic. As mentioned before, schemes that are used by conformity assessment bodies have to be approved by SBK (procedural and substantive test) (Sect. 4).[50]

One of the committees of SBK, the Harmonisation Commission Construction, has an important role to play in monitoring whether procedures are properly followed in the establishment of certification schemes and whether no foreclosure takes place.[51] According to Article 5 para. 2 of the Tripartite Agreement, this

[48] See also supra, Sect. 2.

[49] Evers (2002), pp. 104, 105, and 211–213; Peeters et al. (2009), pp. 69 f and 73.

[50] Neerhof (2013b), pp. 109 f and 210; Andersson Elffers Felix (2011), pp. 22 f.

[51] Neerhof (2013b), p. 110; Andersson Elffers Felix (2011), pp. 24 f.

committee consists of representatives of all interested parties. We do not know to what extent it contributes to the support for the certification schemes. Administrative authorities tend to withdraw from participation in committees of experts. This may adversely affect the monitoring of quality and support of certification schemes.

In a report on the system of quality certification, the researchers note that there is an appearance of conflict of interests in these systems because members of different boards, committees or councils wear several hats at the same time, especially when also acting as a construction industry representative.[52]

Accreditation of Conformity Assessment Bodies and Legitimacy of Conformity Assessment

As mentioned earlier, according to the Tripartite agreement, certification in the terms of the Building Decree should be done by accredited bodies (Sect. 4). Article 3 para. 1, of this Agreement states that accredited conformity assessment bodies provide quality certificates. In the Netherlands, the RvA, an accreditation body in the terms of Articles 4 and 5 of Regulation (EC) No. 765/2008, accredits conformity assessment bodies against harmonised accreditation standards. This means that conformity assessment bodies that want to issue quality certificates within the ambit of the Building Decree must meet the accreditation requirements relating to independence, impartiality, and technical competence (Article 5(1) Regulation (EC) No. 765/2008).

The RvA reviews certification schemes in the case of a request from a body for accreditation to carry out a conformity assessment activity based on these schemes. This review includes the composition of the college of experts establishing these schemes.[53] In addition, SBK tests support for these schemes by examining how criticism is processed, and judges the composition of the committee of experts. Only further investigation could show to what extent the composition of the committees of experts that decide on certification schemes (which are in line with public law building rules) still has vulnerabilities and how these schemes are developed.[54]

5.3 Effectiveness

There are also some specific topics concerning the effectiveness of conformity assessment under European law and Dutch law.

[52] Neerhof (2013b), p. 110.

[53] The testing is based on T33.

[54] The composition of the committees of experts should not only be well-regulated, but it should also be possible for everyone to know it. About support for and legitimacy of conformity certification schemes in construction law in the Netherlands, see Neerhof (2013b), pp. 109 f.

5.3.1 Assessment and Verification of Constancy of Performance Under CPR

In Sect. 5.2.1, I argued that, according to an analysis of the implementation of the CPR, the strict requirements for notified bodies in Article 43 CPR and the notification procedure according to Articles 47 and 48 CPR seem to have had a positive effect in terms of ensuring the impartiality of notified bodies and addressing issues relating to conflicts of interests. The establishment of notifying authorities is likely to have had a positive effect in terms of enhancing the credibility of the CPR.[55] This may also be important for their effectiveness and the realisation of the objectives of the CPR.

Stakeholders have identified, however, that in accordance with the analysis mentioned above, the accreditation process for notified bodies could be improved.[56] Furthermore, there is a perception amongst stakeholders that practices of notified bodies can vary greatly, in part because Article 46 CPR (facilities outside the testing laboratory of the notified body) and Article 52(2) CPR (operational obligations for notified bodies) are not sufficiently precise in their wording. Stakeholders further identified that the process for challenging the competence of a notified body, as set out in Article 50 CPR, should become faster and more efficient to ensure that the credibility of the CPR is not jeopardised. Concerns have been raised with respect to Article 53 CPR (information obligations for notified bodies). It is impossible to implement this provision and to maintain confidentiality.[57]

However, it may be that only further research will show how effective the notified bodies are. Economic operators can go to 'forum shopping' to obtain the best possible rating at the lowest possible cost. Independency and impartiality of a notified body (in relation to its client) may be under pressure, which could adversely affect the reliability of conformity certificates. Competition does not necessarily have to be at the expense of quality. At this moment, we do not exactly know what effects market forces have on the impartiality of notified bodies.[58]

Effectiveness of assessment and verification of constancy of performance in terms of achieving the objectives of the CPR is not only determined by competence of notified bodies. This effectiveness is also determined by what they are required to do and to explain under the CPR. Notified bodies must assess the performance of the construction products in relation to their essential characteristics in accordance with a harmonised standard (Article 17(3) and (4) CPR). According to some experts in the Netherlands, an important problem is that in practice there is no direct relation between harmonised technical specifications for assessing the performance of construction products and basic requirements for construction works. Basic requirements for construction works are mechanical resistance and stability, fire safety,

[55] Nwaogu et al. (2015), pp. iv–v.

[56] Ibid., p. v.

[57] Ibid., pp. iv–v.

[58] Compare Neerhof (2013b), pp. 110 f.

sustainable use of natural resources, etc.[59] Construction products are not construction works, but semi-finished products that are processed in construction works. Performance of construction products is not the same as performance of construction works.

To put this into perspective, it has to be recognised that according to Article 6(3)(c) CPR, the declaration of performance of a manufacturer must contain the performance of at least one of the essential characteristics of the construction product, *relevant for the declared intended use or uses*. According to Article 17(3) CPR, a harmonised standard has to refer to an intended use of products to be covered by it, when provided for in the relevant mandate. This also has consequences for the conformity assessment by notified bodies under the CPR. The intended use in a construction work should be included in this conformity assessment. Still, there seem to be problems. The processing of construction products in a particular construction work (end-use) is not guaranteed by the declaration of performance and CE marking. The intended use of construction products differs. Performances of construction works are often created in an interplay of performances of different construction products used in the same building. The requirements imposed by Member States on construction works differ considerably due to geographical differences and historically developed conditions. Moreover, Article 6(3)(c) CPR only demands parties to declare at least one of the essential characteristics of the construction product. In this context, the manufacturer and the notified body may take into account the requirements in a particular Member State. But the declaration of performance and the conformity certificate of a notified bodies have their limitations. The extent to which the outlined problem actually occurs can only be explained by empirical research.

5.3.2 Third Party Conformity Assessment Under National Legislation: The Dutch Building Decree as an Example

From the perspective of effectiveness of conformity assessment by third parties, there are also questions about the usefulness of quality certificates as referred to in art. Article 1.8 of the Building Decree. Based on research conducted some years ago, the usefulness of the information provided for market actors is probably limited but this may also be related to insufficient knowledge. The connection between certification schemes, which concern conformity assessment of construction products, and processes and requirements to be met by construction works in the Building Decree is not always clear. The contribution of quality certificates to the overall quality of construction works seems insufficient to justify the additional costs, efforts or long lead times. However, the market value of the certificates may be large, partly due to the mark used. Research conducted seems to be stuck at the level of impressions, but does not allow us to draw concrete conclusions. In particular, any added value (in particular charge relief) of quality certificates could possibly

[59] Andersson Elffers Felix (2011), p. 27; compare Neerhof (2013b), pp. 29 f.

be realised by declaring about the performance of a construction as a whole or at least parts of such a construction.[60]

Foreclosure may affect the effectiveness of conformity assessment under the Building Decree. Foreclosure may arise because owners of certification schemes are often conformity assessment bodies with a strong market position. For the use of these certification schemes, other conformity assessment bodies have to pay a considerable amount of money, which enables the owner of the scheme to further strengthen his position on the market vis-à-vis these bodies. If, in the process of the establishment of certification schemes, strong market actors are disproportionately represented, this may cause an obstacle for sound and effective conformity assessment. Further investigation could show whether the way in which SBK fulfils its task sufficiently guarantees the quality of certification schemes.[61]

In 2011, the Dutch Inspectorate for Housing, Spatial Planning and the Environment reported possible irregularities in certification. Under pressure from the market, conformity assessment bodies issued certificates, which, considering the relevant certification schemes (accepted by SBK), should not have been issued. Certification schemes for new products or applications might not have sufficient quality.[62]

Research on the system of quality certification under the Building Decree by a research institute in 2011 revealed that a majority of officials of building and housing inspections of municipalities had little faith in the market of quality certificates recognised by SBK. Furthermore, the corrective function of SBK in the system of quality certificates may not have a high enough profile, due to insufficient opportunities for intervention, for example, in the case of fraud. There is some concern that SBK is not sufficiently prepared to take action if certification schemes do not ensure the necessary quality of construction products. The knowledge about the functioning of the system remains incomplete and fragmentary.[63]

6 Voluntary Certification of Construction Products: Three Legal Issues

In this section, I discuss three legal issues, which arise in relation to voluntary quality certificates for construction products in the European Union: conflicts of current certificates with Article 8(3) CPR; potential conflicts with Articles 30 and 34 TFEU (free movement of goods); and potential conflicts with Articles 101–106 TFEU (EU competition law). I will focus on voluntary certification of construction products in the Netherlands, but the questions mentioned may arise in other Member-States as well.

[60] Neerhof (2013b), pp. 117–119; Andersson Elffers Felix (2011), pp. 18, 20, 22–25, and 30–31; Vermande (2010), pp. 15, 17 f, 21 f, 25 f, and 28; VROM-Inspectie (2011), pp. 20 f.

[61] Neerhof (2013b), p. 110.

[62] Ibid., pp. 112 and 210–211; VROM-Inspectie (2011), pp. 18, 19, and 21. However, see for critical methodological remarks about this report from this inspectorate Neerhof (2013b), pp. 113 f.

[63] Neerhof (2013b), pp. 210 f; Andersson Elffers Felix (2011), pp. 18 and 22.

6.1 Article 8(3) CPR

Some Member States seem to tolerate the voluntary use of quality marks that overlap with CE marking.[64] This is the case, for example, in the Netherlands. The main problem in the field of certification of construction products in the Netherlands has to do with Articles 8(3) and 4(2) CPR. The text of Article 8(3) CPR provides that for any construction product covered by a harmonised standard, CE marking is the only marking which attests conformity of the construction product with the declared quality standard. Moreover, Article 4(2) CPR states that information in any form about the performance of a standardised construction product in relation to essential characteristics, as defined in the applicable harmonised technical specification, may only be provided if included and specified in the declaration of performance. Article 8(3) CPR also provides that Member States should not introduce any references and must withdraw any references in national measures to a mark attesting conformity with the declared performance in relation to the essential characteristics covered by a harmonised standard other than the CE marking. What does this mean for the certification of construction products in Member States which overlap with the information required in the declaration and in the CE marking?

Where a matter has been the subject of exhaustive harmonisation at Union level any national measure relating to that matter must be assessed in the light of the provisions of the harmonising measure and not those of the Treaty, according to the Court.[65] Therefore, in line with the decision of the Court in the case of *A.G.M.-COS.MET*, it must be determined whether the harmonisation effected by the CPR precludes the legal relevance of considering the compatibility of the conduct at issue—certification of construction products in the Netherlands—with Article 34 TFEU.[66] According to the Commission, the harmonised system created in or by means of the CPR is considered exhaustive.[67] Considering the preamble of the CPR, this seems to be correct.[68] This means that under the CPR national *ex ante* processes or verifications covering the harmonised area are not allowed. According to the Commission, this is also the case for voluntary marks without any national connotation, as they unduly prevent the free movement of CE-marked construction products, for example when linked to a more demanding system of assessment and verification of

[64] Nwaogu et al. (2015), p. 29.

[65] See, inter alia, ECJ, judgment of 13.12.2001, Case C-324/99 *DaimlerChrysler*, ECLI:EU:C:2001:682, para 32.

[66] ECJ, judgment of 17-04-2007, Case C-470/03 *A.G.M.-COS.MET*, ECLI:EU:C:2007:213, par. 50–54. About this topic: Reich (2008), pp. 88 f.

[67] Report from the Commission on the implementation of Reg (EU) No 305/2011 laying down harmonised conditions for the marketing of construction products, COM(2016) 445 final, 3.

[68] According to recital 10 of the CPR, the removal of technical barriers in the field of construction may only be achieved by the establishment of harmonised technical specifications for the purposes of assessing the performance of construction products. According to recital 24 the placing on the market of a construction product which is covered by such specifications should be accompanied by a declaration of performance in accordance with these specifications.

constancy of performance (AVCP) imposed by building inspections or insurance companies or when linked to financial incentives.[69] It means that national marks declaring performance of a construction product in relation to the essential characteristics covered by that harmonised standard are forbidden. It means it is prohibited to refer in national measures to marks and certificates 'in the harmonised zone.' That is the reason why Article 1.8 Building Decree only assigns evidence to a quality certificate about performances of a construction product *not* covered by a harmonised standard.

Under the CPD, the predecessor of the CPR, the Court of Justice decided that the Federal Republic of Germany had failed to fulfil its obligations under this Directive. The failure lay in adding additional requirements for effective market access and the use of construction products in the building regulations of the German Länder, while these products are covered by the harmonised standards and bear the CE marking.[70] The case was about a legal requirement for certification conflicting with the CPD, not about voluntary certification.

In the above analysis of the CPR implementation, the researchers found overall that mandatory CE marking has not enhanced the free movement of construction products. This is most likely because CE marking was previously undertaken in all but four Member States under the CPD, and quality marks are still in use.[71] In a report on the implementation of the CPR of 7 July 2016, the Commission found that the use of national marks (marks or, more generally, procedures creating *ex ante* requirements for manufacturers with a national connotation) 'continues in several Member States against the principles of the CPR.'[72]

In the Netherlands, certificates of construction products are in use—in conflict with the CPR—because they make declarations about quality which is covered by harmonised standards. KOMO and Kiwa manage voluntary marks that overlap with CE marking. This means that economic operators still use quality certificates (with or without a quality mark) which attest conformity of the construction product with a declared performance covered by a harmonised standard and CE marking. KOMO, manager of a quality mark for construction products, and some of the certification bodies (and economic operators) seem to think that Article 8 CPR only addresses governments but *not* economic operators. This would mean that governments are prohibited to refer in national measures to a mark attesting conformity with the declared performance covered by a harmonised standard, whereas economic operators are still allowed to use such a mark.

The Dutch Administrative Jurisdiction Division of the Council of State, the country's highest general administrative court, has not yet taken a decision about the

[69] COM(2016) 445 final, 5.

[70] ECJ, judgment of 6/10/2014, Case C-100/13 *Commission v Germany (Ü-Mark)*, ECLI:EU:C:2014:2293.

[71] Nwaogu et al. (2015), pp. ii and 28–29.

[72] COM(2016) 445 final, 5; cf. European Commission, Guidance document—The application of the Mutual Recognition Regulation to non-CE-marked construction products, http://ec.europa.eu/DocsRoom/documents/5881, para 4.1.

effects of Article 8 CPR on Dutch certification of construction products.[73] It is clear what judgment the Council of State will give about a refusal of the Minister for Internal Relations to take enforcement action against an economic operator as referred to in the CPR that use such a voluntary mark of KOMO or Kiwa in conflict with the CPR. The CPR is directly applicable. The provisions of the CPR are addressed to Member States and economic operators. Under the CPR, economic operators are not allowed to use private *ex ante* certification and marking in the field of mandatory CE marking when they place a construction product on the market or make this product available on the market (Article 8(3) CPR). The operators referred to in the CPR are manufacturers, agents of manufacturers, distributors and importers (Article 2 no. 8 CPR). Article 16(1) of Regulation (EC) No. 765/2008 states that Member States must organise and carry out market surveillance which ensures that products covered by harmonisation legislation of the European Union which do not conform to applicable requirements set out in the legislation are withdrawn or their market availability is prohibited or restricted (and that the public, the Commission and the other Member States are informed accordingly).[74] In the Netherlands, the Minister for Interior Relations is the market surveillance authority in relation to the CPR.[75] Since 1998, the Council of State has placed a duty on administrative authorities to enforce the law by means of administrative coercion or a cease and desist letter in case of a violation. This duty cannot be disregarded even though the power to impose a sanction is discretionary. In 2016, the Minister for Housing announced that the time of tolerance was over. Quality certificates recognised by SBK as evidence that certain requirements in the Building Decree have been met (Article 1.8 Building Decree 2012) but are in violation of the CPR do no longer apply as evidence as meant in the Building Decree. The Minister announced that the Environmental and Transport Inspectorate's response to any maladministration would entail more than a warning.[76] However, no concrete enforcement actions have yet been taken.

[73] Contrary to the belief of KOMO, the Council of State did not decide in the *Desmepol* case (Dutch Administrative Jurisdiction Division of the Council of State, 8/6/2016, ECLI:NL:RVS:2016:1613) that the CPR had not been violated. Moreover, contrary to the belief of the Dutch Environmental and Transport Inspectorate, the Dutch Council of State did not decide that this inspectorate is allowed to continue to monitor manufacturers, importers and distributors of construction products for use of private marks in the zone of the mandatory European CE marking under the CPR. The CPR was not yet in force at the time when the Dutch Minister for Housing took the decision which was challenged in the Council of State. This decision entailed a refusal to take enforcement action against KOMO and Kiwa, who manage voluntary marks that overlap with CE marking. Art 8(3) CPR addresses governments and economic operators, not managers of quality marks such as KOMO or Kiwa or conformity assessment bodies.

[74] According to Art 17(1) of this Regulation, Member States shall inform the Commission of their market surveillance authorities and their areas of competence.

[75] According to Art 1.10 Building Decree 2012, actions in violation of the obligations arising from the CPR are prohibited. Under Art 120 and Art 120b of the Dutch Housing Act, the Minister for Interior Relations may impose on the offender an order subject to a penalty or an administrative fine.

[76] Blok: 'KOMO moet zich aan de wet houden', *Cobouw* 26 April 2016; *Kamerstukken II* 2015/16, 32,757, no. 132, 20; *Kamerstukken II* 2015/16, 32,757, no. 134, 2. Cf. *Kamerstukken II* 2015/16,

6.2 *Article 34 TFEU*

Where performances of a construction product are *not* covered by a harmonised specification as meant in the CPR, they are not subject to exhaustive harmonisation at Union level. This means that Article 34 TFEU applies to voluntary certification that relates to these performances. Therefore, the second legal issue concerning quality certificates for construction products has to do with Article 34 TFEU.

Article 34 TFEU states that quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. According to Article 36 TFEU, the provisions of Article 34 (and Article 35) shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions must not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.[77]

In Belgium, products bearing the Benor mark, a registered trademark owned by the Belgian Institute for Standardisation NBI, were presumed to comply with specifications included in the Belgium regulations on construction products. Therefore, traders were actually required to obtain Belgian conformity marks for the trading of those products in Belgium. In March 2008, the Court of Justice decided that Belgium had failed to fulfil its obligations under Article 28 EC (now Article 34 TFEU) and Article 30 EC (now Article 36 TFEU) by encouraging traders wishing to market in Belgium construction products legally manufactured and/or marketed in another Member State to obtain Belgian conformity marks in Belgium.[78]

In *Fra.bo*,[79] the Court had to decide whether Article 34 TFEU applied to private conformity assessment bodies. The case was about a conflict between a German standardisation and conformity assessment body—*the Deutsche Vereinigung des*

32,757, no. 117, 1–2; *Aanhangsel Handelingen II* 2014/15, 825; 'Einde strijdige en discutabele certificaten in het erkende stelsel', www.bouwkwaliteit.nl; *Kamerstukken II 2015/16*, 32,757, no. 121, 1–2; *Cobouw* 26 April 2016; *Kamerstukken II* 2015/16, 32,757, no. 132, 20.

[77] The principle of mutual recognition is one of the means of ensuring the free movement of goods within the internal market. The Mutual Recognition Regulation (n 9) establishes procedures to minimise the possibility of technical rules creating unlawful obstacles to the free movement of goods between Member States (recital (4) of the regulation). Only those construction products to which the CE marking has not been affixed are non-harmonised and fall within the scope of this Regulation. CE-marked construction products are to be dealt with in accordance with the provisions of the CPR. Guidance document Mutual Recognition Regulation to non-CE-marked construction products (n 72), Sect. 3. I don't discuss mutual recognition any further in this contribution.

[78] ECJ, 13/3/2008, Case C-227/06 *Commission v Belgium*, ECLI:EU:C:2008:160.

[79] ECJ, 12/7/2012, Case C-171/11, *Fra.bo SpA v Deutsche Vereinigung des Gas- und Wasserfaches eV (DVGW) — Technisch-Wissenschaftlicher Verein*, ECLI:EU:C:2012:453.

Gas- und Wasserfaches e.V. (DVGW)[80]—and an Italian company (Fra.bo), an undertaking established in Italy, which manufactures and sells copper fittings: connections between two pieces of piping for water or gas.[81] Fra.bo was confronted with the need to adapt its products to German standards, developed and certified by the DVGW. In 2005, this German body cancelled Fra.bo's certificate for copper fittings and rejected an application for extension of the certificate. Fra.bo did not subject its copper fittings to a certain test prescribed in an amended technical standard as adopted and applied by the DVGW. The DVGW refused to take a certificate of an Italian accredited laboratory into account.[82]

Fra.bo brought an action against the DVGW before the Landgericht Köln (Regional Court of Cologne) arguing that the cancellation and/or the refusal to extend the certificate was contrary to European Union law. The Regulation on General Conditions for Water Supply in Germany (*Verordnung über Allgemeine Bedingungen für die Versorgung mit Wasser*; AVBWasserV) lays down the general sales conditions for water supply undertakings and their customers, from which the parties are free to depart. § 12 para. 4 AVBWasserV stated that only products and devices supplied in accordance with the recognised rules of technology may be used. Compliance with this condition should be assumed if they have specific CE marking for drinking water use. Where such CE marking was not stipulated, compliance should also be assumed if the product or device bears the mark of an accredited certifying body for the industry, in particular the DIN-DVGW or DVGW mark. For copper fittings, there were no harmonized specifications as referred to in the CPD, the predecessor of the CPR.[83] Because CE marking therefore was not stipulated, compliance should be assumed if the product or device bears the mark of an accredited certifying body for the industry, in particular the DIN-DVGW or DVGW mark. Products and devices, which were lawfully manufactured in another Member State of the European Union and did not meet the technical specifications for the DIN-DVGW or DVGW mark, should be treated as equivalent if the same level of protection as required in Germany is thereby permanently ensured.[84] Due to the presumption of compliance conferred on products certified by the DVGW under § 12 para. 4 AVBWasserV, it would be virtually impossible for Fra.bo to distribute its products in Germany without that certificate. The required test would have no objective

[80] The DVGW is a non-profit body governed by private law, the object of which is to promote the gas and water sector. The DVGW is recognised in Germany as a 'public benefit' body, see ECJ, *Fra.bo* (n 79), para 7.

[81] Ibid., para 6.

[82] The certificate was cancelled because Fra.bo had not submitted a positive test report on the 3000-hour test. This test consists in exposing the copper fitting's elastomeric waterproof joint to a temperature of 110 °C in boiling water for 3000 hours. Ibid., paras 10–12.

[83] As a result, the CPD did not preclude the compatibility of the conduct at issue—certification of copper fittings—with Art 34 TFEU from being legally relevant. See n 65 and n 66.

[84] Ibid., para 5. The copper fittings at issue in the main proceedings are 'construction products' within the meaning of the CPD which are not subject to a harmonised standard, European technical approval or a national technical specification recognised at European Union level, as referred to the CPD. See ibid., para 18.

justification and the DVGW would not be entitled to reject outright test reports from laboratories, which are accredited by the competent authorities in Member States other than the Federal Republic of Germany, but not by the DGVW. In Fra.bo's submission, the DVGW was bound by the provisions governing the free movement of goods (Article 28 EC), and the cancellation and refusal to extend the certificate both considerably restricted its access to the German market.[85] Therefore, the case was about a breach of the German private standardisation body of the rules on the free movement of goods. Notably, the Federal Republic of Germany does not finance and has no decisive influence over the activities of DVGW.[86]

The Landgericht Köln dismissed Fra.bo's action. Fra.bo appealed against that decision before the Oberlandesgericht (OLG) Düsseldorf in order to have, on the same grounds, the DVGW ordered to extend the compliance certificate for the fittings in question.[87] The OLG Düsseldorf decided to stay the proceedings and to refer questions to the Court for a preliminary ruling. One of the two questions the Court had to answer was whether Article 28 EC must be interpreted as meaning that it applies to standardisation and certification activities of a private-law body, where the national legislature expressly regards the products in respect of which certificates have been issued as lawful, thus making it at least considerably more difficult in practice to distribute products in respect of which certificates have not been issued.[88]

It was not disputed by the parties to the main proceedings that the DVGW is the only body able to certify the copper fittings at issue for the purposes of § 12 para. 4 ABVWasserV. The DVGW offers the only possibility for obtaining a compliance certificate for such products.[89] The DVGW and the German government referred to a procedure other than certification by the DVGW, which consists in entrusting an expert with the task of verifying a product's compliance with the recognised rules of technology within the meaning of § 12 para. 4 AVBWasserV. According to the Court, it was however apparent, that this alternative procedure was of little or no practical use. This was because of the administrative difficulties associated with the absence of specific rules of procedure governing the work of the relevant experts, combined with the additional costs incurred by having an individual expert report drawn up.[90]

The referring court took the view that, in practice, the lack of certification by the DVGW placed a considerable restriction on the marketing of the products concerned in the German market. Although the AVBWasserV merely lays down the general sales conditions as between water supply undertakings and their customers, from which the parties are free to depart, it was apparent from the case-file that, in practice, almost all German consumers purchase copper fittings certified by the

[85] Ibid., para 13.

[86] Ibid., para 24.

[87] Ibid., para 15.

[88] Ibid., paras 16, 17, 21. See also van Gestel and Micklitz (2013), p. 159.

[89] Ibid., para 27–28.

[90] Ibid., para 29.

DVGW.[91] The Court concluded that in such circumstances, it is clear that a body such as the DVGW in reality holds the power to regulate the entry into the German market of products such as the copper fittings at issue, by virtue of its authority to certify the products.[92]

Accordingly, the answer to the question was that Article 28 EC must be interpreted as meaning that it applies to standardisation and certification activities of a private-law body, where the national legislation considers the products certified by that body to be compliant with national law and that has the effect of restricting the marketing of products which are not certified by that body.[93]

At first sight, the judgment does not seem to have an impact on certificates that are not mandatory, such as quality certificates under Article 1.8 Building Decree.[94] It is possible though that in the future, the Court will adopt a wider approach in relation to the applicability of provisions on the free movement of goods by private institutions, including voluntary conformity assessment.[95] As far as the applicability of these provisions to certificates such as quality certification under the Building Decree is concerned, the Court may argue that, although not mandatory, they are in principle sufficient proof that the requirements of the Building Decree have been met. However, the added value will probably also have to be proven in other ways.

6.3 Articles 101 and 102 TFEU

The third legal issue in relation to Dutch quality certificates for construction products has to do with Articles 101–106 TFEU. According to Article 101(1) TFEU, all agreements between undertakings, decisions by associations of undertakings and concerted practices, must be prohibited as incompatible with the internal market; where they may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the internal market,.

Third party conformity assessment is an economic activity, which in principle may be engaged in by a private undertaking and with the view to a profit. According to settled case law, any activity consisting of offering goods and services on a given market is an economic activity.[96] The concept of an undertaking encompasses every

[91] Ibid., para 30.

[92] Ibid., para 31.

[93] ECJ – *Fra.bo* (n 79).

[94] Compare ECJ, 6/6/2002, Case C-159/00 *Sapod Audic v Eco-Emballages SA*, ECLI:EU:C:2002:343.

[95] Compare Steyger (2012), pp. 2115 f and 2121; van Leeuwen (2013), p. 406 f.

[96] ECJ, 19/2/2002, Case C-309/99, ECLI:EU:C:2002:98 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten*, para 47, with further references.

entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed.[97]

A body governed by private law, which sets up a certification system for certain products or companies to which affiliation is optional, establishes independently the criteria which the certified products or companies must satisfy and issues a certificate only on payment of a subscription, is engaged in an economic activity and therefore must be regarded as an undertaking within the meaning of Article 101 TFEU.[98]

Article 101 TFEU requires certification systems to be 'open'. Agreements between undertakings and concerted practices that prohibit the purchases of uncertified goods or services or goods and services of uncertified firms cannot be objectively justified by an interest in maintaining the quality of the products and services ensured by the certification system. On the contrary, the failure to accept equivalent guarantees offered by other systems protects certified undertakings from competition from uncertified undertakings.[99]

According to Article 101(3) TFEU, the provisions of Article 101(1) TFEU, may be declared inapplicable in the case of agreements, decisions and concerted practices, which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which do not:

(a) impose on the undertakings concerned, restrictions which are not indispensable to the attainment of these objectives;
(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

For third party conformity assessment systems, recourse to Article 101(3) TFEU would be possible if there was added value in terms of improvement of production or technical or economic progress. Restrictions on competition caught by Article 101(1) TFEU cannot be justified under this section just because the certification scheme is (far) more effective than the public scheme of monitoring. An exception to that rule may be allowed where public authorities have, of their own will, decided to entrust the monitoring of compliance with statutory requirements to a private body.[100] The added value of a certification system does not derive merely from the

[97] ECJ, 23/4/1991, Case C-41/90 *Klaus Höfner and Fritz Elser v Macrotron GmbH*, ECLI:EU:C:1991:161, para 21.

[98] See Court of First Instance, 22/10/1997, Joined Cases T-213/95 and T-18/96 *Stichting Certificatie Kraanverhuurbedrijf (SCK) and Federatie van Nederlandse Kraanbedrijven (FNK) v Commission*, paras 120–122; Schepel (2005), pp. 291 f.

[99] CFI – *SCK and FNK/Commission* (n 98), paras 136 f. Well considered, this partly deprives the power of conformity assessment by third parties. See also Schepel (2005), p. 292: 'If certification bodies are obliged to accept 'equivalent guaranteed' their profitability will hurt in the short run by losing clients and in the long run by losing credibility and visibility. Certification will thus loose its value as a powerful marketing instrument and firms will halve less of an incentive to seek it.' Besides, even if a system provides for the acceptance of equivalent guarantees from other systems violation of Article 101 TFEU is possible.

[100] CFI – *SCK and FNK/Commission* (n 98), para 194.

fact that it imposes obligations not laid down by law. The certification system must have real added value. This means that the conditions imposed by it should be appropriate for the purpose of attaining the objective pursued.[101]

Article 102 TFEU prohibits abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it as incompatible with the internal market insofar as it may affect trade between Member States. Thus it prohibits any abuse of a position of economic strength enjoyed by an undertaking which enables it to hinder the maintenance of effective competition on the relevant market by allowing it to behave to an appreciable extent independently of its competitors and customers and ultimately of consumers.[102]

Undertakings could abuse a dominant position with the internal market and commit an infringement of Article 102 TFEU where they, without any objective necessity, use certification schemes and certification to reserve to themselves an activity, which might be carried out by another undertaking on the same market, with the possibility of eliminating all competition from such undertaking.[103] Nor should conformity assessment have unintended inhibiting effects on price competition or production, markets, innovation or technical development.[104]

Insofar as a procedure for establishing certification schemes does not appear to be open to all, these is an indication of a breach of competition law. This certainly applies if there is actually little freedom to develop products that do not comply with the certification scheme and are not eligible for the certificate. If these schemes obstruct or disable competition from other market actors without any objective need, conformity assessment bodies applying them will be guilty of violating Article 102 TFEU. Participation of all stakeholders in certification schemes, their access to documents and 'modes of control and accountability' are important conditions for decision-making by conformity assessment bodies; in order to ensure compliance with competition rules.[105] This also applies to standards, which the conformity assessment is based upon.[106]

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[101] Ibid., paras 202 f; Schepel (2005), pp. 291 f.

[102] ECJ, 9/11/1981, Case C-322/81 *NV Nederlandsche Banden Industrie Michelin v Commission*, ECLI:EU:C:1983:313, para 30.

[103] See ECJ, 3/10/1985, Case 311/84 *Centre belge d'études de marché – Télémarketing (CBEM) v SA Compagnie luxembourgeoise de télédiffusion (CLT) and Information publicité Benelux (IPB)*, ECLI:EU:C:1985:394, para 27; ECJ, 13/12/2001, C-18/88 *Régie des télégraphes et des téléphones v GB-Inno-BM SA*, ECLI:EU:C:1991:474, paras 14–19. The cases are not about conformity assessment.

[104] See: *Kamerstukken II* 1994/95, 21,670, no. 7 and no. 8, 33.

[105] van der Ham (2010), pp. 115–117. See also ECJ – *RTT* (n. 103), paras 14–19; ECJ – *Centre belge d'études de marché – Télémarketing* (n 103), para 27.

[106] I will not discuss this further. See Communication from the Commission, Guidelines on the applicability of Art. 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, [2011] OJ C 11/59, 60. 'Where participation in standard-setting is unrestricted and the procedure for adopting the standard in question is transparent, standardisation agreements which contain no obligation to comply with the standard and provide access to the standard on fair, reasonable and non-discriminatory terms will normally not restrict competition within the meaning of Art. 101(1)'.

Articles 101 and 102 TFEU also apply to Member States. The Treaty requires Member States not to take or maintain in force, measures which could destroy the effectiveness of that provision. It seems likely therefore that governments have a responsibility to ensure compliance with competition rules by conformity assessment bodies; especially when the legislator has given probative value to their certificates and/or a minister has been given the power in national legislation to designate these bodies.[107]

Further research should show whether and to what extent there are competition law risks associated with the functioning of the system of quality certificates under national legislation, for example the Dutch Building Decree. In this decree the legislator has given probative value to recognised quality certificates but they are not legally required and it is not a minister who decides which bodies are competent to issue these declarations. However, there are competition law risks when these quality certificates are actually mandatory as a result of the behaviour of market parties or competent authorities.

7 Main Findings

1. For over two decades, there has been a clear interest in conformity assessment as an instrument for regulation and supervision in addition to exclusive government action in the European Union and its Member States. One of the areas in which this is the case is the construction industry.
2. According to the Construction Products Regulation (CPR), manufacturers must draw up EC declarations of performance for products and affix CE marking to construction products when they are covered by harmonised standards. These standards are established by European standardisation bodies on the basis of 'mandates' issued by the European Commission. Based on the CPR, the Commission establishes which system or systems of conformity assessment are applicable to certain construction products. The Commission may require conformity assessment of products to be carried out by an independent third party. This means conformity assessment must be carried out by a body, designated by a member state, which meets requirements of independence, impartiality and technical competence, which are enshrined in the CPR.

   In the Netherlands, voluntary certification of construction products and building processes have, under certain conditions, legal effect pursuant to the national building legislation. According to Dutch legislation and an executive agreement between SBK (a Dutch private foundation for construction quality), the RvA (the

[107] ECJ, 16/11/1977, Case 13/77 *SA G.B.-INNO-B.M. v Association des détaillants en tabac (ATAB)*, ECLI:EU:C:1977:185, paras 31 f; ECJ – *Höfner v Elser* (n 98), paras 26 f, 32 f; ECJ, 18/6/1991, Case C-260/89 *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, ECLI:EU:C:1991:254, para 35.

Dutch accreditation body), the Minister for Housing and the Minister of Infrastructure and Environment, certification schemes have to be approved by SBK. Conformity assessment must be done by accredited bodies.

3. Third party conformity assessment within the framework of the CPR or national legislation, e.g. the Dutch Building Decree, involves certain risks. There are some specific topics concerning the legitimacy of conformity assessment of construction products under European law and under Dutch law. Regarding legitimacy of this conformity assessment, the following findings are important. Harmonised European standards are established by committees, in which larger companies are better represented than small and medium enterprises.

   The EU Standardisation Regulation calls upon European standardisation bodies to encourage and facilitate an appropriate representation and effective participation of all relevant stakeholders, but the regulation seems to provide rather soft requirements with respect to stakeholder involvement. It is a favourable development that the Court of Justice recently ruled in the case of *James Elliott* that it has jurisdiction to give a preliminary ruling concerning the interpretation of harmonised standards under EU harmonisation legislation. It can be assumed that this judgment of the Court implies that the Court can also adjudicate on the validity of the harmonised standards or their compatibility with higher EU law. According to an analysis of the implementation of the CPR, commissioned by the European Commission in 2015, the strict requirements for notified bodies and the notification procedure according to the CPR have had a positive effect in terms of increasing the credibility of the CPR, legal certainty, and transparency with regard to ensuring that notified bodies are competent and impartial.

   In conformity assessment within the Dutch Building Decree, conformity assessment bodies use the standards provided in this Decree but they also use other standards. According to the aforementioned EU Standardisation Regulation, *national* standardisation bodies must encourage and facilitate the access of small and medium enterprises to standards and standards development processes, but this is a soft requirement and the regulation does not provide any enforcement tools.

   Regarding the legitimacy of certification schemes, only further investigation could show to what extent the composition of the committees of experts deciding upon these schemes (which are in line with public law building rules) still has vulnerabilities in terms of commitment and support from all parties involved, despite the watchful eye of the RvA and SBK.

4. There are also some specific topics concerning the effectiveness of conformity assessment under European law and national law. According to the aforementioned analysis of the implementation of the CPR, stakeholders have identified that the accreditation process for notified bodies under the CPR could be improved. Practices of notified bodies can vary greatly. We do not know exactly what effects market forces have on the impartiality of notified bodies. Another problem may be that in practice there is no direct relation between harmonised technical specifications for assessing the performance of construction products and basic requirements for construction works.

The information provided by voluntary quality certificates under the Dutch Building Decree for market actors is probably limited. It is not always clear what the connections are between certification schemes concerning construction products and processes and requirements to be met by construction works. However, the market value of the declarations may be large. Foreclosure could affect the effectiveness of conformity assessment under the Building Decree. In 2011, a Dutch Inspectorate reported about possible irregularities in certification under this decree. Research in 2011 showed that a majority of officials of building and housing inspections of municipalities had little faith in the market for recognised quality certificates.

5. Member States seem to tolerate voluntary use of quality marks that overlap with CE marking. In the Netherlands there are quality certificates in use, which are in conflict with the CPR because they deal with performances that are covered by a harmonised standard. So far, the highest general administrative court in the Netherlands has not taken any decision about the effects of the CPR on Dutch certification of construction products and the consequences it should have for law enforcement by the Minister of Interior Relations. However it is clear that Article 8(3) CPR prohibits voluntary marks that overlap with CE marking.

Where performances of a construction product are not covered by a harmonised specification as meant by the CPR, they are not subject to exhaustive harmonisation at Union level. This means Article 34 TFEU applies to voluntary certification that relates to these performances. In the *Fra.bo* case, the Court of Justice decided that Article 28 EC (now Article 34 TFEU) must be interpreted as meaning that it applies to standardisation and certification activities of a private-law body where the national legislation considers the products certified by that body to be compliant with national law and that has the effect of restricting the marketing of products which are not certified by that body. This may have implications for voluntary quality decisions, even if they are not legally enforced.

There may be competition law risks associated with the functioning of a system of quality certificates. Third party conformity assessment on payment of a subscription by a private body qualifies as an economic activity by a private undertaking. Articles 101–106 TFEU apply to conformity assessment of construction products. Article 101 TFEU stipulates that certification systems should be ‘open’. Agreements and concerted practices that prohibit the purchase of uncertified goods cannot be objectively justified by an interest in maintaining the quality of the products and services ensured by the certification system. In principle, restrictions on competition caught by Article 101(1) TFEU cannot be justified by Article 101(3) TFEU just because the certification scheme is (far) more effective than a public scheme of monitoring. The added value of a certification system does not derive merely from the fact that it imposes obligations not laid down by law. The conditions imposed by a certification system should be appropriate for the purpose of attaining the pursued objective.

Article 102 TFEU prohibits any abuse by undertakings of a dominant position within the internal market in so far as it may affect trade between Member States. Undertakings could infringe Article 102 TFEU where they, without any objective necessity, use certification to reserve to themselves an activity, which might be carried out by another undertaking on the same market, with the possibility of eliminating all competition from such undertaking. Insofar as a procedure for establishing certification schemes does not appear to be open to all, this is an indication of a breach of competition law.

Articles 101 and 102 TFEU also apply to the Member States. Governments therefore have a responsibility to comply with competition rules by conformity assessment bodies, especially when the legislator has given probative value to their certificates and they have been given the power to designate these bodies in national legislation. Under the Dutch Building Decree quality certificates for construction products are not legally required and it is not a minister who decides which bodies are competent. It is the legislator who has given probative value to recognised quality certificates and these quality certificates could actually be mandatory, as a result of the behaviour of market parties or competent authorities. Further research will have to determine whether and to what extent there are competition law risks associated with the functioning of such a system.

I finish with a few concluding remarks. The strict requirements for notified bodies and notification procedure according to the CPR are likely to have had a positive effect in terms of ensuring the impartiality of notified bodies and addressing issues relating to conflicts of interests. The accreditation process for notified bodies could, however, probably still be improved. Practices of notified bodies can vary greatly. At this moment, we do not know enough about what effects market forces have on the impartiality of such bodies. Legitimacy of underlying standards might pose a problem, because larger companies are better represented in the various technical bodies of European standardisation than other organisations.

The system of recognised (voluntary) quality certificates of construction products under the Dutch Building Decree can be criticised since its effectiveness is limited. Some Member States seem to tolerate the voluntary use of quality marks that overlap with CE marking. This is also the case in the Netherlands. There are Dutch quality certificates in use that conflict with the CPR.

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